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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-932

STEVE LEKOMETROS,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

The petitioner, STEVE LEKOMETROS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on January 6, 1975.

OPINIONS BELOW

No formal opinion was rendered by the District Court.

The opinion of the Court of Appeals has not yet been reported, and is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the court below (Appendix B, infra, p. A-21) was entered on January 6, 1975. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner was convicted of conspiracy to violate Title 18, Section 1952 (use of interstate facilities to carry on unlawful gambling activities). Most of the direct incriminating evidence consisted of recorded telephone conversations obtained by wiretaps pursuant to Title 18, Section 2515-2518, some of which were admittedly edited by F.B.I. agents by eliminating those portions of the intercepted conversation which said agents judged to be irrelevant. A request for an evidentiary hearing to determine the role of the Attorney General (Mitchell) in the authorization procedures was denied. The questions presented are:

1. Where intercepted telephone conversations are electronically recorded on tapes, is it lawful for the monitoring F.B.I. agent to selectively record only those portions of each conversation he judges to be relevant, or must he record the entire intercepted conversation?

2. Does editing of tapes of wiretapped telephone conversations, contrary to Title 18, Section 2518(8)(a), render such tapes and the transcripts thereof inadmissible in evidence?

3. Where a defendant challenges the authorization procedure whereby a court-ordered wiretap was obtained under confusing circumstances, is defendant entitled, upon request,

to an evidentiary hearing in which the testimony of the Attorney General or the other authorizing official is obtained in regard to the authorization procedure and time sequence of events?

4. Does *United States v. Chavez*, 416 U. S. 562, 40 L. Ed. 2d 380, foreclose a defendant's right to an evidentiary hearing on the wiretap authorization procedure, where (as in *Chavez*) the Attorney General files an *ex post facto* affidavit asserting that he personally authorized the wiretap even though his original pre-wiretap memorandum seems to designate an Assistant Attorney General as the authorizing official?

5. Can an appellate court dismiss as harmless error the admission of evidence (a newspaper article) which it finds to be both erroneous and prejudicial?

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Sections 1952, 2515, 2516, 2517 and 2518, set forth in Appendix C (infra, p. A-22).

STATEMENT OF FACTS

Petitioner was indicted, along with seven others, in a multi-count indictment charging all defendants with conspiracy to violate Title 18, Section 1952 (using interstate facilities to carry on illegal gambling business) and charging various defendants in different combinations with substantive violations of Section 1952. Petitioner was acquitted by the jury of the only substantive count against him, but was convicted on the conspiracy count.

Much of the direct evidence against petitioner consisted of tapes and transcripts of telephone conversations intercepted and

monitored by F.B.I. agents pursuant to series of court orders under Title 18, United States Code, Sections 2515-2518. Actually thirty-six conversations (Exhibits 4, 4A and 4B through 39, 39A and 39B, inclusive) were introduced in the form of tapes and typewritten transcripts.

A motion to suppress the wiretap evidence, based on improper authorization procedures allegedly employed by the Department of Justice, was filed when Petitioner's counsel learned that the authorization letter purportedly signed by Assistant Attorney General Will Wilson was not, in fact, signed or reviewed by that official (Appendix below, pp. 77-79). In response to this motion, the government produced a memorandum from Attorney General Mitchell to Will Wilson advising Wilson that "you are specially designated to exercise those powers" conferred by Title 18, Section 2516 (Appendix below, p. 88). The government also produced an affidavit from Mitchell (Appendix below, p. 87), in which he alleges that he personally initialled the foregoing memorandum to Wilson, and that by that memorandum he really intended to advise Wilson that he, Mitchell, had personally authorized the wiretap application. Petitioner was unwilling to accept this somewhat confusing explanation, and filed a motion for an evidentiary hearing on his motion to suppress for the purpose of obtaining direct testimony from Mr. Mitchell concerning his role in the authorization procedure (Appendix below, pp. 80-81). This was denied (Appendix below, p. 84).

During the course of the trial itself, when F.B.I. agents were called upon to describe the methods used in effecting the wiretaps, it was learned that some tapes and transcripts did not contain all of the conversations which were intercepted and overheard. The monitoring agent, who intercepted and overheard the entire conversation, would turn the recording mechanism off and on, so that he recorded only those portions of the conversations he personally judged to be relevant (R. 310-311).

On one particular conversation, for example (Exhibit 31-B), the unrecorded gaps in the conversation were indicated in the transcript by the parenthetical phrase "(Private Conversation)." Similar gaps were later found in transcripts of conversations which were intercepted under this same order but not used in evidence in this trial (Appendix below, pp. 104-114).

Also during the course of the trial, the prosecution was permitted, over objections, to have its witness read to the jury a newspaper article concerning nation-wide gambling raids, containing among other things an assertion by the Attorney General that gambling is the "financial apparatus which bankrolls organized crime." (R. 264-265). Following the reading of the article, the trial court instructed the jury that the article "is not of itself evidence of the truth of any fact contained in the article" (R. 268).

In affirming the conviction of petitioner, the Eighth Circuit opinion asserted that the Supreme Court holding in *United States v. Chavez*, 416 U. S. 562, 40 L. Ed. 2d 380, foreclosed any right of petitioner for an evidentiary hearing to determine Attorney General Mitchell's role in the authorization procedure, although the author of the opinion below (Judge Heaney) personally favored such a hearing. (Appendix A, fn. 5, pp. A-5-6) In addition, the court below refused to consider the issue of editing and selective recording of the intercepted conversation on the grounds that it was not sufficiently raised in the trial court (Appendix A, p. A-10). On the matter of the newspaper article, the court below held that although the reading of the article was both improper and prejudicial, it was nevertheless "harmless" (Appendix A, pp. A-14-15).

REASONS FOR GRANTING THE WRIT

1. The instant record, manifesting deliberate actions by government agents to edit the tapes and transcripts of intercepted conversations, raises serious questions concerning the wiretap statutes, and particularly Section 2518(8)(a), which apparently have not been considered in any appeal prior to now. Section 2518(8)(a) (Appendix C, p. A-30) actually establishes two rules in regard to preservation of intercepted conversation:

(1) The contents of any intercepted conversation *shall*, if possible, be recorded.

(2) The recording *shall* be done so as to avoid editing.

Both of these statutory mandates were admittedly violated here. Entire conversations were intercepted and monitored, but only portions were recorded, at the discretion of the monitoring F.B.I. agent. This obviously resulted in edited tapes and transcripts, which contained only those parts of the conversations which the agent wanted them to contain.

The appellate court refused to rule on this issue on the grounds it was not sufficiently raised in the trial court (Appendix A, p. A-10), even though the government, in its brief and oral argument below, never suggested such a defense to this point. In truth and in fact, the original motions to suppress filed before trial included the allegation that "the procedure for interception was invalid and unconstitutional" (Appendix below, p. 77). Moreover, the editing of the tapes and transcripts offered in evidence was not discovered or disclosed until the middle of the trial itself, when an F.B.I. agent testified as to the meaning of the "private conversation" interjection in the transcript (R. 310-311); and when the tapes and transcripts were offered into evidence, all objections described in the motions to suppress were preserved by agreement of all counsel and the trial court (R.

1062). For these obvious reasons, the government did not at any time argue to the appellate court that the editing issue was foreclosed from review, yet the Eighth Circuit, perhaps because of its unfamiliarity with the minute details of a long and complicated record, erroneously refused to consider the point.

In any event, this issue is much too important to be dismissed or disregarded on technical procedural grounds. It involves a deliberate and flagrant violation by the government of the clear mandate of the statute, in an area in which this nation has already had too much painful experience. If, indeed, the government was wrong in editing the tapes, and if it had not been so carefully preserved in the motions to suppress as explained above despite its unexpectedness, it is an error so plain and substantial that it cries out for recognition under Rule 52(b), Federal Rules of Criminal Procedure.

This issue thus far has not been raised or decided by any appellate court. It is one which requires immediate attention and resolution by the Supreme Court to prevent continued and widespread abuse of wiretap procedures. This Court is already aware, by virtue of the arguments in *United States v. Giordano*, 416 U. S. 505, 40 L. Ed. 2d 341, and *United States v. Chavez*, 416 U. S. 562, 40 L. Ed. 2d 380, of the extensive use of wiretaps by the Department of Justice, and should act now to limit that use to the proper confines of the statute. In this regard, it should decide at once whether the editing of tapes by selective recording, in violation of Section 2518(8)(a), makes the telephone conversation "unlawfully intercepted" within the meaning of *Giordano*, or is merely a non-substantive error similar to that in *Chavez*.

It is clear from this record and the arguments below that the Department of Justice believes its wiretapping agents have the right, at their discretion, to record and preserve only those portions of intercepted and monitored conversations which they

deem to be relevant, and that therefore the preservation of any exculpatory matter in such conversations must depend solely upon the good faith of the agents operating the recording device. But it has now become alarmingly clear to this entire nation that misleading, self-serving, and distorted impressions can be easily conveyed to a jury of twelve or to an entire populace from tapes and transcripts which are fragmentary or edited. The resolution of this obvious problem lies only with this Court.

2. The decision below, denying an evidentiary hearing to probe the true role of Attorney General Mitchell in the authorization procedures, expands the *Chavez* holding to an extent never anticipated or intended by this Court. To be sure, the authorization procedures here and in *Chavez* are similar: a memorandum from Mitchell to Assistant Attorney General Wilson, initialled by Mitchell, advises Wilson that "you are hereby specially designated" to exercise the powers conferred in Section 2516; later, *after* motions to suppress are filed, Mitchell submits an affidavit to the trial court averring that by that memorandum he really meant to indicate his personal approval of the wiretap. Mr. Justice White, writing for the majority in *Chavez*, specifically noted that the memorandum on its face "suggested that the decision whether to authorize the particular wiretap application would be made by Assistant Attorney General Wilson", 40 L. Ed. 2d at p. 388. However, because both the district court and appellate court *assumed*, without objection by defendant, that the Attorney General did in fact personally approve the wiretap, the apparent inconsistency between the Mitchell memorandum and his explanatory affidavit was disregardad. *Chavez*, therefore, was decided by this Court only on the issue as to misidentification of the authorizing official in the district court's wiretap order.

In the instant case, Judge Heaney, who authored the opinion below, indicated that he personally favored a remand for an evidentiary hearing to determine the true Mitchell role in

the proceedings, but a majority of the court disagreed (Appendix A, fn. 5, pp. A-5-6). Similarly, in his concurring opinion in *United States v. Brick*, 502 F. 2d 219, 227, Judge Bright expressed his belief that such a hearing should be required. In each instance, however, the majority of each Eighth Circuit panel felt that a remand for such hearing was foreclosed by *Chavez*. The Fifth Circuit, on the other hand, in a pre-*Chavez* opinion, specifically ordered a remand for such an evidentiary hearing to obtain the direct testimony of Mitchell, *United States v. Robinson*, 472 F. 2d 973.

A review by this Court is therefore in order to dispel the idea that *Chavez* intended to preclude a defendant's right to a full adversary hearing on a motion to suppress based on unlawful authorization procedures. At least two judges of the Eighth Circuit would insist on such a hearing, and perhaps the entire court below would agree, if they did not feel restrained by the *Chavez* holding. Certainly the matter should be settled now, before the *Chavez* opinion is allowed to become precedent for matters far beyond the anticipation of the five justices who constituted the majority therein.

The constitutional implications of this issue are at once obvious, and a serious infringement on Sixth Amendment rights of confrontation could result if the holding below is permitted to stand. Here petitioner was faced, in reply to his motion to suppress, with a memorandum apparently initialled by the Attorney General plus an *ex post facto* affidavit which gives the memorandum an entirely different meaning than the plain wording therein. But petitioner is compelled to be bound by that affidavit, without the right to confront and cross-examine Mr. Mitchell to determine the reason for the inconsistency and the true role which he played in the sequence of events leading up to the wiretap authorization. This restriction contravenes the historical and traditional guarantees of the Sixth Amendment, recently so well expressed by Mr. Justice Powell in *Chambers v. Mississippi*, 410 U. S. 284, 295:

> "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' "

Moreover, if permitted to stand, the ruling below, with its misplaced reliance on *Chavez*, would provide all future prosecutors with a sure and simple method to avoid the consequences of *United States v. Giordano*, supra. Any motion to suppress wiretaps based upon improper authorization procedures and violation of Section 2516 could be summarily defeated by an *ex post facto* affidavit by the Attorney General (or any designated Assistant Attorney General) that he personally approved the wiretap, irrespective of the absence of written records in the Department of Justice reflecting such approval. The defendant, according to the opinion below, would be bound by that affidavit, foreclosed from an evidentiary hearing on the subject, and deprived of the right to cross-examine the affiant. Surely this Court did not intend for *Chavez* to have such far-reaching consequences and also forever insulate Attorneys General and Assistant Attorneys General from judicial examination and accountability as to wire-tapping procedures. Recent conduct by such high officials of the Department of Justice (while still bound by their oaths of office) would belie such an intent by this Court.

3. The opinion below introduces a new dimension to the "harmless error" doctrine set forth in Rule 52(a), Federal Rules of Criminal Procedures. In reviewing the introduction by the government of a newspaper article which brands bookmakers as the "financial apparatus which bankrolls organized crime," the Eighth Circuit conceded that such evidence was both improper *and* prejudicial, yet dismissed the matter as harmless error (Appendix A, pp. A-14-15). Petitioner submits that if the error was admittedly prejudicial, it cannot conceivably be harmless. The principle of harmless error was developed to eliminate only those technical errors which do not affect the substantial rights of the

parties, Title 28, U. S. Code, former Section 391. Former Section 556 of Title 18, in fact, the forerunner of Rule 52(a), defined disregardable defects as those "which shall not tend to the *prejudice* of the defendant." Here, then, where the improper evidence is found to be prejudicial, the disregard of same is an unprecedented extension of the harmless error doctrine which must be clarified to prevent future confusion in this important area.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 72-1565

United States of America,
Appellee,

v.

Nick John,
Appellant.

No. 72-1566

United States of America,
Appellee,

v.

Victor Padratzik, etc.,
Appellant.

No. 72-1581

United States of America,
Appellee,

v.

Charles Bernstein, etc.,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 72-1594

United States of America,
Appellee,

v.

Steve Lekometros, etc.,
Appellant.

Submitted: June 14, 1973

Filed: January 6, 1975

Before Mr. Justice Clark,* Heaney, Circuit Judge, and Schatz, District Judge.**

Heaney, Circuit Judge.

Victor Padratzik and Charles Bernstein were found guilty of violating 18 U.S.C. § 1952[1] and of a conspiracy to violate the statute. Nick John and Steve Lekometros were found guilty

* Tom C. Clark, Associate Justice, Retired, United States Supreme Court, sitting by designation.

** Albert G. Schatz, District Judge, District of Nebraska, sitting by designation.

[1] § 1952. *Interstate and foreign travel or transportation in aid of racketeering enterprises.*

(a) Whoever travels in interstate * * * commerce or uses any facility in interstate * * * commerce, * * * with intent to—

(1) to distribute the proceeds of any unlawful activity; or

* * * * * * *

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to

of a conspiracy to violate the same statute. Evidence obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) was essential to the government's case. Thirteen points of error are assigned on review; each will be discussed separately. We affirm.

I. The Constitutionality of 18 U.S.C. § 1952.

Appellants assert, without supporting argument, that 18 U.S.C. § 1952 is violative of the First, Fifth, Sixth and Tenth Amendments to the United States Constitution. This naked assertion of unconstitutionality is insufficient to warrant judicial review. *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970), *cert. denied*, 401 U.S. 917 (1971). Moreover, we have upheld the constitutionality of the section in prior cases. *See, e. g., United States v. Nichols*, 421 F.2d 570 (8th Cir. 1970); *Spinelli v. United States*, 382 F.2d 871 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969); *Bass v. United States*, 324 F.2d 168 (8th Cir. 1963).

II. The Constitutionality of 18 U.S.C. §§ 2515-2518.

Appellants also attack the constitutionality of §§ 2515-2518 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. They invite us to reconsider *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972), where we found Title III to be constitutional. We decline the invitation.

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perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling * * *.

III. Whether the Government's Failure to Correctly Identify the Officer Who in Fact Authorized Applications for Wiretap Orders Pursuant to 18 U.S.C. § 2518(1)(a) Requires Suppression of the Wiretap Evidence.

This issue was decided adversely to the appellants in *United States v. Chavez*, — U.S. —, 40 L.Ed.2d 380 (1974). Here, as in *Chavez*, the application for the order authorizing the interception of wire communications misidentified the officer authorizing the application in violation of 18 U.S.C. § 2518(1)(a).[2] At trial, it was established, by affidavit, that then Attorney General John Mitchell was the officer who in fact gave the authorization to apply for the order.[3] The Supreme Court in *Chavez* held that the initial misidentification, although improper, did not render the interceptions conducted under the order unlawful and subject to suppression. It reasoned that § 2518

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[2] § 2518. *Procedure for interception of wire or oral communications.*

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application[.]

[3] The affidavit of Attorney General Mitchell read as follows:

I held the office of Attorney General of the United States from January 21, 1969, through March 1, 1972.

On January 8, March 10, April 19, and May 13, 1971, I personally initialed memoranda authorizing applications for interception orders in this case. Copies of these memoranda are attached.

Each memorandum also constituted a notification to the Assistant Attorney General of the Criminal Division that I had performed the discretionary act of authorizing an application to a judge of competent jurisdiction for the specified interception order.

(1)(a) does not play a role in the regulatory scheme of Title III sufficient to justify the remedy of suppression when its provisions are violated. *United States v. Chavez, supra* at 394-395. *See also United States of America v. Eugene Schaefer, et al.*, Nos. 73-1506, 73-1526, 73-1538, 73-1577, 73-1578, 73-1611 and 73-1617 (8th Cir. December 1974); *United States of America v. Steve Thomas, et al.*, Nos. 73-1490 and 73-1544 (8th Cir. December . . ., 1974); *United States v. Brick*, 502 F. 2d 219 (8th Cir. 1974); *United States v. Cox, supra.*

Appellants request further that the case be remanded for an evidentiary hearing to challenge Mr. Mitchell's sworn statement that the authority to apply for the wiretap order was given before the order issued.[4] We deny the request. We have held that the Supreme Court has approved the procedure followed here. *See United States v. Brick, supra* at 227 (Bright, J., concurring).[5]

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[4] Title III requires that:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offenses as to which the application is made
> * * *

18 U.S.C. § 2516(1).

[5] The author agrees with Judge Bright's concurring opinion in *United States v. Brick*, 502 F.2d 219 (8th Cir. 1974), that an evidentiary hearing would dispel the residual doubts as to the compliance with Title III. Section 2516(1) requires:

> * * * [T]hat the authority * * * be exercised *before* the application is presented to a federal judge. * * * It would ill serve the congressional policy of having the Attorney General or one of his Assistants screening the applications prior to their submission to court to have the screening process occur after the application is made and after investigative officials have already begun to intercept wire or oral communications under a court

IV. Whether the Postponement of the Service of the Notice and Inventory Pursuant to § 2518(8)(d) of the Act Requires Suppression of the Wiretap Evidence.

During the course of the government's investigation between January 8, 1971 and May 14, 1971, four orders authorizing the interception of wire communications were issued. The investigation terminated with the arrest of the appellants on June 19, 1971. Only the first order, issued January 8, 1971, became subject to the notice and inventory requirements of 18 U.S.C. § 2518(8)(d)[6] before the investigation terminated.[7] In

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order predicated on the assumption that proper authorization to apply for intercept authority had been given.

United States v. Giordano, — U.S. —, 40 L.Ed.2d 341, 358 n. 12 (1974) (Emphasis included).

He would go a step further and remand for such a hearing, but a majority of this Court has decided that a remand is unnecessary.

[6] 18 U.S.C. § 2518(8)(d) reads as follows:

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

[7] Because we find that the orders of postponement conformed to the statutory requirements, it is not necessary to decide whether, in a

order to preserve the effectiveness of the continuing investigation, the government applied for and received on April 22, 1971 and May 21, 1971, two successive orders of postponement of the service of the notice and inventory for the first wiretap order. The appellants assign this as error.

We emphasize that the inventory requirements were not ignored here. *See United States v. Eastman*, 465 F.2d 1057 (3rd Cir. 1972). Post-use notice must always be given by the issuing judge. *United States v. Wolk*, 466 F.2d 1143, 1146 (8th Cir. 1972). The notice here was received by the appellants after their arrest. Issue is taken only with the postponement of the notice and inventory which caused the service to occur more than ninety days after the termination of the first wiretap order.

Title III requires that an order of postponement be based upon "good cause." 18 U.S.C. § 2518(8)(d). Here, the postponement was found by the District Court to be necessary for the continued effectiveness of the government's investigation. This reason has been held sufficient to satisfy the "good cause" requirement. *United States v. Manfredi*, 488 F.2d 588, 602 (2nd Cir. 1973), *cert. denied*, 43 U.S.L.W. 3667 (1974); *United States v. Lawson*, 334 F.Supp. 612, 616 (E.D. Pa. 1971). *See* American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance, "Approved Draft 1971" at 161.

> * * * On an ex parte showing of good cause, the serving of the inventory may be, not dispensed with, but postponed. For example, where interception is discontinued at one location, when the subject moves, but is reestablished at the subjects new location, or the investigation itself is still in progress, even though interception is terminated at any one

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particular case, the "reasonable time" language of 18 U.S.C. § 2518 (8)(d) would require the service of the notice and inventory before the expiration of the outside limit of ninety days.

> place, the inventory due at the first location could be postponed until the investigation is complete. * * *

Senate Report No. 1097, 2 U.S. Code Cong. & Ad. News, p. 2194 (1968).

Moreover, we are satisfied, after reviewing the record, that the court below did not err in finding the facts sufficient to support the reason given. At least one of the persons affected by the first wiretap order was also affected by the other wiretap orders. It was probable that notice of the first order would have undermined the effectiveness of the subsequent orders. The completed wiretaps had produced evidence of a large scale gambling operation. Also, the preservation of the integrity of the subsequent orders was likely to result in the continued interception of incriminating communications. The postponement here was not improper.

V. Whether the Government's Execution of the Wiretap Orders Disregarded the Minimization Mandate of § 2518(5) of the Act.

Appellants challenge, for the first time, the manner in which the government executed the wiretap orders. They assert that the government's continuous surveillance of the home telephones without regard to whether the persons suspected of illegality were on the premises[8] was violative of the minimization require-

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[8] All four orders authorizing the interception of the conversations conducted on these telephones required the government to proceed in a manner likely to minimize the interception of communications not subject to the order. The appellants challenge the government's procedure because a distinction was made between the surveillance of the home telephones and the surveillance of the pay telephones. In regard to the latter, the government was authorized to intercept the communications only when it was determined, by physical surveillance, that a suspect was using the pay telephone.

None of the home telephones subject to the order authorizing the interception of the conversations were issued to the appellants. In view of our disposition of this issue, it is not necessary to determine whether the appellants have standing to complain.

ments of 18 U.S.C. § 2518(5).[9] The government does not contest the factual assertions; it justifies its procedure thusly:

> * * * A similar condition [to minimize surveillance] placed upon appellants' private lines would have been inappropriate because it would have prevented the agents from conducting a surveillance of pertinent calls actually intended for appellants, and because it would have impaired their rightful task to ascertain the identity of others believed to be involved in the conspiracy and the full extent of the bookmaking scheme.

We are not entirely satisfied with the justification given by the government. It may open the door wider than the Fourth Amendment permits. We do not decide in this case, however, whether the minimization requirements of 18 U.S.C. § 2518(5) have been exceeded because the appellants failed to raise the issue below and such failure precludes review of this Court. *Brooks v. United States*, 500 F.2d 103, 105 (8th Cir. 1974); 18 U.S.C. § 2518(10)(a). Moreover, because the attendant facts were not fully developed below, review pursuant to our discretionary power to recognize plain error is impossible. *See United States v. Wright*, 466 F.2d 1256, 1259 (2nd Cir. 1972),

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[9] 18 U.S.C. § 2518(5) reads as follows:

> No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

cert. denied, 410 U.S. 916 (1973). Whether the minimization requirements of Title III have been disregarded is a question that can be answered only after a review of the facts and circumstances of each case. What is excessive in one case may be appropriate in another. *United States v. Cox, supra* at 1300. *See United States v. Manfredi, supra; United States v. Lanza*, 349 F.Supp. 929 (M.D. Fla. 1972). We leave to the appropriate occasion review of this question.

VI. **The Government's Failure to Record the Entirety of Each Communication Intercepted.**

The appellant's second attack on the government's execution of the wiretap orders is also raised for the first time in this Court. They charge that the government violated 18 U.S.C. § 2518(8)(a) which requires, *inter alia*, that the recording of the intercepted communications "shall be done in such a way as will protect the recordings from editing."

The record shows that the government agents listened to the entirety of each communication intercepted but recorded only those parts that "pertained to gambling." "Private conversations" were not recorded. Whether this procedure failed to protect the recordings from editing in violation of the statute is a question we do not here decide. The appellants were aware of the procedure used before trial but did not move for suppression pursuant to 18 U.S.C. § 2518(10)(a), nor do they claim they were denied the opportunity to do so. Neither did they challenge the admission of the recordings on the ground of questionable authenticity. *See United States of America v. Eugene Wesley Howard*, Nos. 73-1856, 73-1857 (8th Cir. October 29, 1974), Slip Op. 12; *United States v. Knohl*, 379 F.2d 427 (2nd Cir.), *cert. denied*, 389 U.S. 973 (1967). The failure to raise the issue below forecloses review.

VII. **Whether the Court Erred in Providing the Jury Typed Transcripts of the Communications Intercepted While the Tapes Thereof Were Being Played to the Jury.**

The trial court provided the jury with a typed transcript of each intercepted recording offered into evidence by the government. The appellants argue that this violated the best evidence rule, the rule against improper emphasis and repetition and the rule against hearsay.

The use of typed transcripts as visual aids to the jury in listening to the playback of the recorded communications is a matter within the sound discretion of the trial judge. *United States v. Carson*, 464 F.2d 424, 437 (2nd Cir.), *cert. denied*, 409 U.S. 949 (1972); *Fountain v. United States*, 384 F.2d 624, 632 (5th Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968); *United States v. Hall*, 342 F.2d 849, 853 (4th Cir.), *cert. denied*, 382 U.S. 812 (1965).

In the exercise of his discretion, the judge below reviewed the transcripts and found that they were prepared with care and accurately reflected the recorded communications. He also determined that the transcripts were necessary to enable the jury to intelligently follow the recorded conversations which contained gambling language unfamiliar to the jurors. Before distributing the transcripts, the court carefully instructed the jury on their limited use. It directed the jury to use the transcripts only as aids in listening to the recordings and to base its verdict upon what was heard and not upon what was read. Further, the jurors were directed to listen carefully to the declarant's manner and emphasis of speech so as to understand the meaning of what was said. Finally, the transcripts were not made available to the jury during its deliberation. We cannot say that this careful and considered use of the typed transcripts was an abuse of discretion.

VIII. **The Installation of Pen Registers.**

In conjunction with each order authorizing the interception of wire communications, the District Court issued an order authorizing the installation of pen register on the telephones involved. The appellants' contention that this was improper rests upon a two-pronged argument: Title III of the Act does not authorize the use of pen registers, and further, their use is specifically prohibited by 47 U.S.C. § 605.

Our decision in *United States v. Brick, supra,* explains the error in appellants' argument. Neither Title III nor 47 U.S.C. §605, as amended, prohibit the use of pen registers.

> * * * In this situation it has been held that a pen register order based upon a showing of probable cause, even if considered to be a "search" is not constitutionally offensive * * *.

United States v. Brick, supra at 223.

The propriety of their use depends entirely upon compliance with the Fourth Amendment.[10] *United States v. Giordano,* — U.S. —, 40 L.Ed.2d 341, 375 (1974) (Powell, J., concurring and dissenting).

Upon review of the government's affidavits submitted to the court in application for the orders authorizing the interception of wire communications, we are in agreement with the court below that there was probable cause for the installation of pen registers. The affidavits contained detailed accounts of the personal observations of agents of the FBI, as well as information supplied by reliable unnamed informants, that linked the ap-

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[10] Because the orders authorizing the installation of pen registers satisfied the probable cause requirement of the Fourth Amendment, it is not necessary to decide whether their use constitutes a "search." *See United States v. Giordano, supra* at 375 n. 4; *United States v. Brick, supra* at 223.

pellants to bookmaking. The informants' reliability had been established by previous dealings, and the information supplied here was based on firsthand knowledge. Each informant was actively engaged in gambling activities in the St. Louis, Missouri, area. The orders authorizing the installation of pen registers were constitutionally proper.

IX. **Whether the Court Erred in Refusing to Strike the Testimony of FBI Agent Wilkison Because of the Government's Failure to Record and Produce His Grand Jury Testimony in Light of the Fact That the Testimony of Other Grand Jury Witnesses Was Recorded.**

During the grand jury proceedings resulting in the indictment of the appellants, the government recorded some, but not all, of the testimony presented. For example, the testimony of Aaron Singer, a codefendant who had pleaded guilty, was recorded, while the testimony of FBI Agent Wilkison, who was one of the agents principally in charge of the investigation of the appellants, was not recorded. The appellants assign as error the unfairness of the government's action which made discovery pursuant to the Jencks Act (18 U.S.C. §3500(e)(3)) impossible. They argue that the testimony of Agent Wilkison at trial should not have been admitted. It is important to note that the appellants do not contend that the grand jury was used abusively as a vehicle for discovery. *See United States of America v. Pasquale Sellaro*, No. 71-1719 (8th Cir. June 12, 1973).

While the recording of all grand jury testimony is the desirable procedure, it is not mandatory.[11] *United States v. Franklin*,

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[11] Rule 6 of the Federal Rules of Criminal Procedure has been severely criticized for not requiring the government to record all grand jury testimony. *See, e.g., United States v. Arradondo*, 483 F.2d 980, 984 n. 4 (8th Cir. 1973); *United States v. King*, 478 F.2d 494, 507 (9th Cir. 1973), *cert. denied*, 414 U.S. 846 (1974); *Wright, Federal Practice and Procedure*, § 103 at 161.

429 F.2d 274, 276 (8th Cir.), *cert. denied*, 400 U.S. 967 (1970); F.R.Crim.P. 6. Moreover, the selective recording of grand jury testimony has been held not to be offensive to due process. *United States v. Arradondo*, 483 F.2d 980, 984 (8th Cir. 1973). While we are sympathetic to the appellants' complaint and recognize the limited nature of the relief sought, this Court is without power to amend Rule 6 of the Federal Rules of Criminal Procedure. The power lies with the Congress.

X. **Whether Reversible Error Resulted From the Introduction Into Evidence of a Newspaper Article Prejudicial to the Appellants.**

The government introduced, and had read to the jury, the contents of a newspaper article which FBI agents had observed appellant Lekometros read to appellants Padratzik and John. It was admitted for the purpose of proving the guilty knowledge of the appellants.[12] The relevancy of the newspaper article is not contested. The appellants argue, rather, that the prejudicial effect of its introduction into evidence outweighed the probative value. They assert that the verbatim reading of the newspaper article attacked their character and intimated they were part of a more heinous conspiracy than the one charged. We agree that the article should not have been read, but find the error harmless.

The court instructed the jury, immediately after the newspaper article was read, to consider only the fact that Mr. Lekometros had read the article to Messrs. Padratzik and John, and not to consider the article as proof of any fact stated therein. The government's testimony which followed also was limited to the relevant issue of *scienter;* the prejudicial nature of the article was not emphasized either during trial or in closing ar-

[12] 18 U.S.C. § 1952 requires, as an element of proof, the knowing involvement in an unlawful activity.

gument. This isolated intrusion of prejudicial evidence in a record strongly supporting the verdict of the jury had but slight, if any, effect and must be judged as harmless. *See United States v. Oliver*, 492 F.2d 943 (8th Cir. 1974); *United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974).

XI. **Whether the Admission Into Evidence of the Recorded Statements of Persons Not Defendants at Trial Violated the Rule Against Hearsay.**

The appellants objected to twenty of the thirty-five recorded communications admitted into evidence on the ground that they contained statements of persons not defendants at trial. The appellants contend that the admission of these recordings violated the rule against hearsay.

A well recognized exception to the rule against hearsay provides:

> * * * [O]ut of court statements made by a conspirator can be admitted against both declarant and his coconspirator if there is independent evidence of the conspiracy and if the statements were made during the pendency of the conspiracy in furtherance of the conspiracy itself.

United States v. Overshon, 494 F.2d 894, 898 (8th Cir. 1974). The exception is not limited to the statements of conspirators who are made defendants at trial. *United States v. Richardson*, 477 F.2d 1280, 1283 (8th Cir.), *cert. denied* 414 U.S. 843 (1973).

The statements of Eugene Hanon, Aaron Singer and David Goldberg, if hearsay, were within the exception to the rule and properly admitted. There is independent evidence in the record to indicate that they were coconspirators and that their statements were made during the conspiracy and in furtherance

of it. Because we find no independent evidence that Joe Samuelson, Ben Cohen and Mark Hanon were coconspirators, a closer review of their statements is necessary.

The statements of Ben Cohen and Mark Hanon were not hearsay. Their statements were received into evidence for the fact that the statements were made and not for the truth or falsity of the matters asserted. The statements of Joe Samuelson, with a few exceptions, were properly received on the same basis. The remaining statements were received by the court on the government's offer of proof that he would be shown to be a coconspirator. *See United States v. Reed*, 446 F.2d 1226, 1231 (8th Cir. 1971). Moreover, the court instructed the jury that before it could use the statements against anyone but the declarant, it had to find that Mr. Samuelson was a coconspirator. There is nothing in the record to indicate that the jury did not follow that instruction. We also note that no motion to strike Samuelson's testimony at the close of the evidence was made.

XII. The Sufficiency of the Evidence.

A. The substantive offense.

Appellants Padratzik and Bernstein challenge the sufficiency of the evidence to support the verdict of the jury finding them guilty of violating 18 U.S.C. § 1952 as a principal or an aider and abettor under 18 U.S.C. § 2. Section 1952 requires proof: (1) that a facility in interstate commerce was used by the defendants, (2) with intent by them to carry on or facilitate the carrying on of an unlawful activity in Missouri, and (3) thereafter they committed an act or attempt in furtherance of the unlawful activity. *Spinelli v. United States, supra,* at 893. The aiding and abetting statute requires proof of some affirmative participation which at least encourages the perpetrator. *United*

States v. Atkins, 473 F.2d 308, 310 (8th Cir.), *cert. denied* 412 U.S. 931 (1973).

The appellants concede the sufficiency of the evidence of use of a facility in interstate commerce—the telephone. They challenge the sufficiency of the evidence to support the second and third elements. We view these challenges in the light most favorable to the jury verdict with all evidentiary conflicts resolved in favor of that determination. *United States v. Simone*, 495 F.2d 752, 753 (8th Cir. 1974).

In this light, we hold that the jury could find the requisite intent from the recordings of the conversations between appellant Padratzik, in Missouri, and appellant Bernstein, in Las Vegas. The interstate telephone calls were used to pass line information from Bernstein to Padratzik with knowledge on the part of both that the line information would be used in a bookmaking operation by Padratzik and others in Missouri.

The jury finding of the subsequent overt act in furtherance of an activity violative of state law turns upon the requirements of Mo.Rev.Stat. §§ 563.350 and 563.360. The appellants argue that the evidence is insufficient to show a violation of either statute because there is nothing to show that they recorded or registered bets. Such a showing would prove the violation of state law. Mo.Rev.Stat. § 563.360, however, prohibits more than the act of recording bets and wagers. *United States of America v. Pasquale Sellaro, supra* at Slip Op. 9.

The evidence shows that appellant Padratzik distributed to Missouri bookmakers the line information received from Las Vegas by telephone. Moreover, the gambling paraphernalia seized at the arrest of appellant Padratzik and John supports the conclusion that they too recorded bets or wagers. The jury conclusion that Mr. Padratzik acted in violation of 18 U.S.C. § 1952, and that Mr. Bernstein, who supplied the line informa-

tion necessary to the gambling operation, was at the very least an aider and abettor punishable as a principal is supported by the record.

B. Conspiracy offense

All appellants challenge the sufficiency of the evidence to support their conviction of conspiracy. Appellant John argues further that even if the evidence shows the existence of a conspiracy, his participation therein was not violative of federal law.

The record shows a concert of action among the appellants. Padratzik received the line information from his Las Vegas contact, Bernstein, and then directed his employee, John, on the use of that line information. John, in turn, would report to Padratzik on the bets received. Appellant Lekometros also maintained a Las Vegas contact, David Goldberg,[13] for the receipt of line information. Padratzik and Lekometros would compare and discuss the line information received from their respective sources. Together with appellant John and others, they would also meet together to discuss the operation of the bookmaking business. Other meetings were held in Las Vegas with Padratzik, Lekometros, Bernstein and Goldberg for the same purpose.

John's contention that his participation in the conspiracy was not violative of federal law rests upon his asserted lack of knowledge of use of an interstate facility. He relies on *United States v. Barnes*, 383 F.2d 287 (6th Cir. 1967), *cert. denied*, 389 U.S. 1040 (1968). The reliance is misplaced, for the record supports the conclusion that John knew the telephone was used by Padratzik in Missouri to obtain line information from a Nevada source.

A conspiracy is rarely proved by direct evidence. The proof usually rests upon circumstantial evidence and inferences drawn

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[13] Mr. Goldberg was severed from the trial and the charges against him were later dismissed by the government.

from the relationship of the parties. *Koolish v. United States*, 340 F.2d 513, 523 (8th Cir.), *cert. denied*, 381 U.S. 951 (1965). Here, the jury could conclude from the meetings attended by John, where gambling was discussed and telephone calls attempted, that he knew of the Las Vegas contact.

XIII. **Whether Submission of the Case to the Jury on the Theory of One Conspiracy Was Correct.**

The jury was instructed that before it could find the appellants guilty of conspiracy, it had to find beyond a reasonable doubt that a conspiracy existed and that each appellant was a member thereof. The appellants assert that the evidence showed not one but several conspiracies and argue that the failure of the instruction to conform to the evidence requires reversal. They cite *Kotteakos v. United States*, 328 U.S. 750 (1946).

The facts here, however, are dissimilar to those presented in *Kotteakos*, for the evidence establishes the existence of but one conspiracy.

> The answer to the question whether there is a single conspiracy * * * depends on whether there is a single agreement. There may be an undertaking to commit one crime or several crimes. If there is but one agreement, there is but one conspiracy. A test whether the activities of the defendants constitute a single conspiracy is whether there is a common purpose underlying the separate acts, whether the same objective is being pursued in each instance, and whether there is concerted action to achieve this end.

Koolish v. United States, supra at 524, citing from *United States v. Speed*, 78 F.Supp. 366, 368 (D. D.C. 1948).

The facts recited in section XII show that each appellant acted with the others to promote the operation of the gambling

business. The fact that they may have also acted as independent bookmakers does not preclude their participation in the single conspiracy. *United States v. Hanon*, 428 F.2d 101, 108 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971).

Affirmed.

A true copy

Attest

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

Judgment

(Filed January 8, 1974)

United States Court of Appeals
For the Eighth Circuit

No. 72-1594. September Term, 1974.

The United States,

Appellee,

vs.

Charles Bernstein, aka Chuck Bernes and Charles Bernes, David Goldberg, Eugene Joseph Hanon, aka "The Kid," Mark Joseph Hanon, aka "Sonny," Nick John, Steve Lekometros, aka "The Greek,"

Appellant,

Victor Padratzik, aka "V.I.," Aaron Nathan Singer, aka "Acey-Ducey," "Asa" and "Andy."

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

January 6, 1975

APPENDIX C

Title 18, United States Code:

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of——

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on pay-

ments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprizes), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit tranactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State

to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted.

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for autorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order,

a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has

been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral com-

munication under this sub-section shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1125

CHARLES BERNSTEIN, etc.,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. .....

CHARLES BERNSTEIN, etc.,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

The petitioner, Charles Bernstein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 6, 1975.

OPINIONS BELOW

No formal opinion was rendered by the District Court.

The opinion of the Court of Appeals has not yet been reported and is reproduced in Appendix A to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1). (The relevant Court orders appear in Appendix B infra).

ISSUES PRESENTED

Petitioner was convicted of violating 18 U.S.C. 1952 (use of interstate facilities to carry on unlawful gambling activities) and conspiracy to violate that statute. The essence of the Government's case consisted of recorded telephone conversation obtained pursuant to Title 18, Section 2515-2518. Some of this surveillance material was edited by FBI agents on the basis of what they judged to be irrelevant. The role of the Attorney General (John Mitchell) in the authorization procedures was vague and uncertain at best. An evidentiary hearing to determine the nature and extent of that role was denied. The issues herein are:

I. Is it lawful for the monitoring government agents to selectively record on tapes only those portions of electronically intercepted telephone conversation which he personally judges to be relevant.

II. Does the discretionary editing of the tapes of wiretapped telephone conversations in violation of Title 18, Section 2518 (8)(a), render such evidence inadmissible?

III. If the edited tapes and the transcripts therefrom are admissible, is Petitioner thereby deprived of Due Process of Law and a fair trial pursuant to the requirements of the Fifth and Sixth Amendments to the Constitution?

IV. Is a defendant entitled to an evidentiary hearing to ascertain the particulars of the authorization procedure and the

time sequence of events, where it is clear that a court-ordered wiretap was obtained under vague and confusing circumstances?

V. Is a defendant foreclosed by *United States v. Chavez*, 416 U.S. 562, 40 L.Ed. 2d 380, to his right to an evidentiary hearing on the wiretap authorization procedure, where the Attorney General files a post-wiretap affidavit asserting his personal authorization of the wiretap, even though his original pre-wiretap memorandum designates an assistant Attorney General as the authorizing official?

VI. Can an Appellate Court dismiss as harmless error the use of evidence (a newspaper article) which it finds to be both erroneous and prejudicial and still assure the defendant the Due Process of Law and a fair trial?

STATUTES INVOLVED

Title 18, United States Code, Sections 1952, 2515, 2516, 2517, and 2518, set forth in Appendix (infra p. A-3).

STATEMENT OF FACTS

Petitioner was indicted with seven co-defendants in a multiple count indictment. All defendants were charged with conspiracy to violate Title 18, section 1952 (use of interstate facilities to conduct illegal gambling activities) and various combinations of defendants were charged with substantive violations of Section 1952. Petitioner was convicted of both substantive and conspiracy counts.

The crux of the Government's case consisted of intercepted telephone conversations obtained by FBI agents pursuant to a series of court orders based upon Title 18, United States Code, Sections 2515-2518. Thirty-six conversations were introduced into evidence in the form of tapes and typewritten transcripts.

A motion to suppress the wiretap evidence, based on improper authorization procedures allegedly employed by the Department of Justice, was filed when Petitioner's counsel learned that the authorization letter purportedly signed by Assistant Attorney General Will Wilson was not, in fact, signed or reviewed by that official (appendix below, pp. 77-79). In response to this motion, the government produced a memorandum from Attorney General Mitchell to Will Wilson advising Wilson that "you are specifically designated to exercise those powers" conferred by Title 18, Section 2516 (appendix below, p. 88). The government also produced an affidavit from Mitchell (Appendix below, p. 87) in which he alleges that he personally initialled the foregoing memorandum to Wilson, and that by the memorandum he really intended to advise Wilson that he, Mitchell, had personally authorized the wiretap application. Petitioner was unwilling to accept this somewhat confusing explanation, and filed a motion for an evidentiary hearing on his motion to suppress for the purpose of obtaining direct testimony from Mr. Mitchell concerning his role in the authorization procedure (Appendix below, pp. 80-81). This was denied (Appendix below, p. 84).

During the course of the trial itself, when FBI agents were called upon to describe the methods used in effecting the wiretaps, it was learned that some tapes and transcripts did not contain all of the conversations which were intercepted and overheard. The monitoring agent, who intercepted and overheard the entire conversation, would turn the recording mechanism off and on, so that he recorded only those portions of the conversations he personally judged to be relevant (R. 310-311). On one particular conversation, for example (Exhibit 31-B), the unrecorded gaps in the conversation were indicated in the transcript by the parenthetical phrase "(Private Conversation)." Similar gaps were later found in transcripts of conversations which were intercepted under this same order but not used in evidence in this trial (Appendix below, pp. 104-114).

Also during the course of the trial, the prosecution was permitted, over objections, to have its witness read to the jury a newspaper article concerning nation-wide gambling raids, containing among other things an assertion by the Attorney General that gambling is the "financial apparatus which bankrolls organized crime." (R. 264-265). Following the reading of the article, the trial court instructed the jury that the article "is not of itself evidence of the truth of any fact contained in the article" (R. 268).

In affirming the conviction of petitioner, the Eighth Circuit opinion asserted that the Supreme Court holding in *United States v. Chavez*, 416 U.S. 562, 40 L.Ed. 2d 380, foreclosed any right of petitioner for an evidentiary hearing to determine Attorney General Mitchell's role in the authorization procedure, although the author of the opinion below (Judge Heaney) personally favored such a hearing. (Appendix A, fn. 5, pp. A-5-6) In addition, the court below refused to consider the issue of editing and selective recording of the intercepted conversation on the grounds that it was not sufficiently raised in the trial court (Appendix A, p. A-10). On the matter of the newspaper article, the court below held that although the reading of the article was both improper and prejudicial, it was nevertheless "harmless" (Appendix A, pp. A-14-15).

REASONS FOR GRANTING THE WRIT

1. The instant record, manifesting deliberate actions by government agents to edit the tapes and transcripts of intercepted conversations, raises serious questions concerning the wiretap statutes, and particularly Section 2518(8)(a), which apparently have not been considered in any appeal prior to now. Section 2518(8)(a) (Appendix C, p. A-31) actually establishes two rules in regard to preservation of intercepted conversation:

(1) The contents of any intercepted conversation shall, if possible, be recorded.

(2) The recording shall be done so as to avoid editing. Both of these statutory mandates were admittedly violated here. Entire conversations were intercepted and monitored, but only portions were recorded, at the discretion of the monitoring FBI agents. This obviously resulted in edited tapes and transcripts, which contained only those parts of the conversations which the agent wanted them to obtain.

The appellate court refused to rule on this issue on the grounds it was not sufficiently raised in the trial court and oral argument below, never suggested such a defense to this point. In truth and in fact, the original motions to suppress filed before trial included the allegation that "the procedure for interception was invalid and unconstitutional" (Appendix below, p. 77). Moreover, the editing of the tapes and transcripts offered in evidence was not discovered or disclosed until the middle of the trial itself, when an FBI agent testified as to the meaning of the "private conversation" interjected in the transcript (R. 210-311); and when the tapes and transcripts were offered into evidence, all objections described in the motions to suppress were preserved by agreement of all counsel and the trial court (R. 1062). For these obvious reasons, the government did not at any time argue to the appellate court that the editing issue

was foreclosed from review, yet the Eighth Circuit, perhaps because of its unfamiliarity with the minute details of a long and complicated record, erroneously refused to consider the point.

In any event, this issue is much too important to be dismissed or disregarded on technical procedural grounds. It involves a deliberate and flagrant violation by the government of the clear mandate of the statute, in an area in which this nation has already had too much painful experience. If, indeed, the government was wrong in editing the tapes, and if it had not been so carefully preserved in the motions to suppress as explained above despite its unexpectedness, it is an error so plain and substantial that it cries out for recognition under Rule 52(b), Federal Rules of Criminal Procedure.

This issue thus far has not been raised or decided by any appellate court. It is one which requires immediate attention and resolution by the Supreme Court to prevent continued and widespread abuse of wiretap procedures. This Court is already aware, by virtue of the arguments in *United States v. Giordano*, 416 U.S. 505, 40 L. Ed. 341, and *United States v. Chavez*, 416 U.S. 562, 40 L. Ed. 2d 380, of the extensive use of wiretaps by the Department of Justice, and should act now to limit that use to the proper confines of the statute. In this regard, it should decide at once whether the editing tapes by selective recording, in violation of Section 2518(8)(a), makes the telephone conversation "unlawfully intercepted" within the meaning of Giordano, or is merely a non-substantive error similar to that in Chavez.

The mandate of Section 2518(8)(a) serves an obvious congressional purpose; the statutes of the United States must comport with the blessings of the Bill of Rights. This section was designed to prevent the unfairness inherent in editing procedures. Our concepts of Due Process and our motions of a fair trial require this.

It is clear from this record and the arguments below that the Department of Justice believes its wiretapping agents have the

right, at their discretion, to record and preserve only those portions of intercepted and monitored conversations which they deem to be relevant, and that therefore the preservation of any exculpatory matter in such conversations must depend solely upon the good faith of the agents operating the recording device. But it has now become alarmingly clear to this entire nation that misleading, self-serving, and distorted impression can be easily conveyed to a jury of twelve or to an entire populace from tapes and transcripts which are fragmentary or edited. The resolution of this obvious problem lies only with this Court.

2. The decision below, denying an evidentiary hearing to probe the true role of Attorney General Mitchell in the authorization procedures, expands the Chavez holding to an extent never anticipated or intended by this Court. To be sure, the authorization procedures here and in Chavez are similar: a memorandum from Mitchell to Assistant Attorney General Wilson, initialed by Mitchell, advises Wilson that "you are hereby specially designated" to exercise the powers conferred in Section 2516; later, after motions to suppress are filed, Mitchell submits an affidavit to the trial court averring that by that memorandum he really meant to indicate his personal approval of the wiretap. Mr. Justice White, writing for the majority in Chavez, specifically noted that the memorandum on its face "suggested that the decision whether to authorize the particular wiretap application would be made by Assistant Attorney General Wilson," 40 L. Ed. 2d at p. 288. However, because both the district court and appellate court assumed, without objection by defendant, that the Attorney General did in fact personally approve the wiretap, the apparent inconsistency between the Mitchell memorandum and his explanatory affidavit was disregarded. Chavez, therefore, was decided by this Court only on the issue as to misidentification of the authorizing official in the district court's wiretap order.

In the instant case, Judge Heaney, who authored the opinion below, indicated that he personally favored a remand for an evidentiary hearing to determine the true Mitchell role in the proceedings, but a majority of the court disagreed (Appendix A, fn. 5, pp. A-5-6). Similarly, in his concurring opinion in *United States v. Brick*, 502 F. 2d 219, 227, Judge Bright expressed his belief that such a hearing should be required. In each instance, however, the majority of each Eighth Circuit panel felt that a remand for such hearing was foreclosed by Chavez. The Fifth Circuit on the other hand, in a pre-Chavez opinion, specifically ordered a remand for such an evidentiary hearing to obtain the direct testimony of Mitchell, *United States v. Robinson*, 472 F. 2d 973.

A review by this Court is therefore in order to dispel the idea that Chavez intended to preclude a defendant's right to a full adversary hearing on a motion to suppress based on unlawful authorization procedures. At least two judges of the Eighth Circuit would insist on such a hearing, and perhaps the entire court below would agree, if they did not feel restrained by the Chavez holding. Certainly the matter should be settled now, before the Chavez opinion is allowed to become precedent for matters far beyond the anticipation of the five justices who constituted the majority therein.

The constitutional implications of this issue are at once obvious and a serious infringement on Sixth Amendment rights of confrontation could result if the holding below is permitted to stand. Here petitioner was faced, in reply to his motion to suppress, with a memorandum apparently initialed by the Attorney General plus an ex post facto affidavit which gives the memorandum an entirely different meaning than the plain wording therein. But petitioner is compelled to be bound by that affidavit, without the right to confront and cross-examine Mr. Mitchell to determine the reason for the inconsistency and the true role which he played in the sequence of events leading up

to the wiretap authorization. This restriction contravenes the historical and traditional guarantees of the Sixth Amendment, recently so well expressed by Mr. Justice Powell in *Chambers v. Mississippi*, 410 U. S. 284, 295:

> "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' "

Moreover, if permitted to stand, the ruling below, with its misplaced reliance on Chavez, would provide all future prosecutors with a sure and simple method to avoid the consequences of *United States v. Giordano*, supra. Any motion to suppress wiretaps based upon improper authorization procedures and violation of Section 2516 could be summarily defeated by an ex post facto affidavit by the Attorney General (or any designated Assistant Attorney General) that he personally approved the wiretap, irrespective of the absence of written records in the Department of Justice reflecting such approval. The defendant, according to the opinion below, would be bound by that affidavit, foreclosed from an evidentiary hearing on the subject, and deprived of the right to cross-examine the affiant. Surely this Court did not intend for Chavez to have such far-reaching consequences and also forever insulate Attorneys General and Assistant Attorneys General from judicial examination and accountability as to wire-tapping procedures. Recent conduct by such high officials of the Department of Justice (while still bound by their oaths of office) would belie such an intent by this Court.

3. The opinion below introduces a new dimension to the "harmless error" doctrine set forth in Rule 52(a), Federal Rules of Criminal Procedures. In reviewing the introduction by the government of a newspaper article which brands bookmakers as the "financial apparatus which bankrolls organized crime," the Eighth Circuit conceded that such evidence was both im-

proper and prejudicial, yet dismissed the matter as harmless error (Appendix A, pp. A-14-15). Petitioner submits that if the error was admittedly prejudicial, it cannot conceivably be harmless. The principle of harmless error was developed to eliminate only those technical errors which do not affect the substantial rights of the parties, Title 28, U. S. Code, former Section 391. Former Section 556 of Title 18, in fact, the forerunner of Rule 52(a), defined disregardable defects as those "which shall not tend to the prejudice of the defendant." Here, then, where the improper evidence is found to be prejudicial, the disregard of same is an unprecedented extension of the harmless error doctrine which must be clarified to prevent future confusion in this important area.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 72-1565

United States of America,
Appellee,

v.

Nick John,
Appellant.

No. 72-1566

United States of America,
Appellee,

v.

Victor Padratzik, etc.,
Appellant.

No. 72-1581

United States of America,
Appellee,

v.

Charles Bernstein, etc.,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 72-1594

United States of America,
Appellee,

v.

Steve Lekometros, etc.,
Appellant.

Submitted: June 14, 1973

Filed: January 6, 1975

Before Mr. Justice Clark,* Heaney, Circuit Judge, and Schatz, District Judge.**

Heaney, Circuit Judge.

Victor Padratzik and Charles Bernstein were found guilty of violating 18 U.S.C. § 1952[1] and of a conspiracy to violate the statute. Nick John and Steve Lekometros were found guilty

* Tom C. Clark, Associate Justice, Retired, United States Supreme Court, sitting by designation.

** Albert G. Schatz, District Judge, District of Nebraska, sitting by designation.

[1] § 1952. *Interstate and foreign travel or transportation in aid of racketeering enterprises.*

(a) Whoever travels in interstate * * * commerce or uses any facility in interstate * * * commerce, * * * with intent to—

(1) to distribute the proceeds of any unlawful activity; or

* * * * * * *

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to

of a conspiracy to violate the same statute. Evidence obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) was essential to the government's case. Thirteen points of error are assigned on review; each will be discussed separately. We affirm.

I. The Constitutionality of 18 U.S.C. § 1952.

Appellants assert, without supporting argument, that 18 U.S.C. § 1952 is violative of the First, Fifth, Sixth and Tenth Amendments to the United States Constitution. This naked assertion of unconstitutionality is insufficient to warrant judicial review. *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970), *cert. denied*, 401 U.S. 917 (1971). Moreover, we have upheld the constitutionality of the section in prior cases. *See, e. g., United States v. Nichols*, 421 F.2d 570 (8th Cir. 1970); *Spinelli v. United States*, 382 F.2d 871 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969); *Bass v. United States*, 324 F.2d 168 (8th Cir. 1963).

II. The Constitutionality of 18 U.S.C. §§ 2515-2518.

Appellants also attack the constitutionality of §§ 2515-2518 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. They invite us to reconsider *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972), where we found Title III to be constitutional. We decline the invitation.

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perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling * * *.

III. Whether the Government's Failure to Correctly Identify the Officer Who in Fact Authorized Applications for Wiretap Orders Pursuant to 18 U.S.C. § 2518(1)(a) Requires Suppression of the Wiretap Evidence.

This issue was decided adversely to the appellants in *United States v. Chavez*, — U.S. —, 40 L.Ed.2d 380 (1974). Here, as in *Chavez*, the application for the order authorizing the interception of wire communications misidentified the officer authorizing the application in violation of 18 U.S.C. § 2518(1)(a).[2] At trial, it was established, by affidavit, that then Attorney General John Mitchell was the officer who in fact gave the authorization to apply for the order.[3] The Supreme Court in *Chavez* held that the initial misidentification, although improper, did not render the interceptions conducted under the order unlawful and subject to suppression. It reasoned that § 2518

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[2] § 2518. *Procedure for interception of wire or oral communications.*

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application[.]

[3] The affidavit of Attorney General Mitchell read as follows:

I held the office of Attorney General of the United States from January 21, 1969, through March 1, 1972.

On January 8, March 10, April 19, and May 13, 1971, I personally initialed memoranda authorizing applications for interception orders in this case. Copies of these memoranda are attached.

Each memorandum also constituted a notification to the Assistant Attorney General of the Criminal Division that I had performed the discretionary act of authorizing an application to a judge of competent jurisdiction for the specified interception order.

(1)(a) does not play a role in the regulatory scheme of Title III sufficient to justify the remedy of suppression when its provisions are violated. *United States v. Chavez, supra* at 394-395. *See also United States of America v. Eugene Schaefer, et al.*, Nos. 73-1506, 73-1526, 73-1538, 73-1577, 73-1578, 73-1611 and 73-1617 (8th Cir. December 1974); *United States of America v. Steve Thomas, et al.*, Nos. 73-1490 and 73-1544 (8th Cir. December . . ., 1974); *United States v. Brick*, 502 F. 2d 219 (8th Cir. 1974); *United States v. Cox, supra.*

Appellants request further that the case be remanded for an evidentiary hearing to challenge Mr. Mitchell's sworn statement that the authority to apply for the wiretap order was given before the order issued.[4] We deny the request. We have held that the Supreme Court has approved the procedure followed here. *See United States v. Brick, supra* at 227 (Bright, J., concurring).[5]

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[4] Title III requires that:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offenses as to which the application is made
> * * *

18 U.S.C. § 2516(1).

[5] The author agrees with Judge Bright's concurring opinion in *United States v. Brick*, 502 F.2d 219 (8th Cir. 1974), that an evidentiary hearing would dispel the residual doubts as to the compliance with Title III. Section 2516(1) requires:

> * * * [T]hat the authority * * * be exercised *before* the application is presented to a federal judge. * * * It would ill serve the congressional policy of having the Attorney General or one of his Assistants screening the applications prior to their submission to court to have the screening process occur after the application is made and after investigative officials have already begun to intercept wire or oral communications under a court

IV. Whether the Postponement of the Service of the Notice and Inventory Pursuant to § 2518(8)(d) of the Act Requires Suppression of the Wiretap Evidence.

During the course of the government's investigation between January 8, 1971 and May 14, 1971, four orders authorizing the interception of wire communications were issued. The investigation terminated with the arrest of the appellants on June 19, 1971. Only the first order, issued January 8, 1971, became subject to the notice and inventory requirements of 18 U.S.C. § 2518(8)(d)[6] before the investigation terminated.[7] In

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order predicated on the assumption that proper authorization to apply for intercept authority had been given.

United States v. Giordano, — U.S. —, 40 L.Ed.2d 341, 358 n. 12 (1974) (Emphasis included).

He would go a step further and remand for such a hearing, but a majority of this Court has decided that a remand is unnecessary.

[6] 18 U.S.C. § 2518(8)(d) reads as follows:

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

[7] Because we find that the orders of postponement conformed to the statutory requirements, it is not necessary to decide whether, in a

order to preserve the effectiveness of the continuing investigation, the government applied for and received on April 22, 1971 and May 21, 1971, two successive orders of postponement of the service of the notice and inventory for the first wiretap order. The appellants assign this as error.

We emphasize that the inventory requirements were not ignored here. *See United States v. Eastman*, 465 F.2d 1057 (3rd Cir. 1972). Post-use notice must always be given by the issuing judge. *United States v. Wolk*, 466 F.2d 1143, 1146 (8th Cir. 1972). The notice here was received by the appellants after their arrest. Issue is taken only with the postponement of the notice and inventory which caused the service to occur more than ninety days after the termination of the first wiretap order.

Title III requires that an order of postponement be based upon "good cause." 18 U.S.C. § 2518(8)(d). Here, the postponement was found by the District Court to be necessary for the continued effectiveness of the government's investigation. This reason has been held sufficient to satisfy the "good cause" requirement. *United States v. Manfredi*, 488 F.2d 588, 602 (2nd Cir. 1973), *cert. denied*, 43 U.S.L.W. 3667 (1974); *United States v. Lawson*, 334 F.Supp. 612, 616 (E.D. Pa. 1971). *See* American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance, "Approved Draft 1971" at 161.

> * * * On an ex parte showing of good cause, the serving of the inventory may be, not dispensed with, but postponed. For example, where interception is discontinued at one location, when the subject moves, but is reestablished at the subjects new location, or the investigation itself is still in progress, even though interception is terminated at any one

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particular case, the "reasonable time" language of 18 U.S.C. § 2518 (8)(d) would require the service of the notice and inventory before the expiration of the outside limit of ninety days.

> place, the inventory due at the first location could be postponed until the investigation is complete. * * *

Senate Report No. 1097, 2 U.S. Code Cong. & Ad. News, p. 2194 (1968).

Moreover, we are satisfied, after reviewing the record, that the court below did not err in finding the facts sufficient to support the reason given. At least one of the persons affected by the first wiretap order was also affected by the other wiretap orders. It was probable that notice of the first order would have undermined the effectiveness of the subsequent orders. The completed wiretaps had produced evidence of a large scale gambling operation. Also, the preservation of the integrity of the subsequent orders was likely to result in the continued interception of incriminating communications. The postponement here was not improper.

V. **Whether the Government's Execution of the Wiretap Orders Disregarded the Minimization Mandate of § 2518(5) of the Act.**

Appellants challenge, for the first time, the manner in which the government executed the wiretap orders. They assert that the government's continuous surveillance of the home telephones without regard to whether the persons suspected of illegality were on the premises[*] was violative of the minimization require-

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[*] All four orders authorizing the interception of the conversations conducted on these telephones required the government to proceed in a manner likely to minimize the interception of communications not subject to the order. The appellants challenge the government's procedure because a distinction was made between the surveillance of the home telephones and the surveillance of the pay telephones. In regard to the latter, the government was authorized to intercept the communications only when it was determined, by physical surveillance, that a suspect was using the pay telephone.

None of the home telephones subject to the order authorizing the interception of the conversations were issued to the appellants. In view of our disposition of this issue, it is not necessary to determine whether the appellants have standing to complain.

ments of 18 U.S.C. § 2518(5).[9] The government does not contest the factual assertions; it justifies its procedure thusly:

> * * * A similar condition [to minimize surveillance] placed upon appellants' private lines would have been inappropriate because it would have prevented the agents from conducting a surveillance of pertinent calls actually intended for appellants, and because it would have impaired their rightful task to ascertain the identity of others believed to be involved in the conspiracy and the full extent of the bookmaking scheme.

We are not entirely satisfied with the justification given by the government. It may open the door wider than the Fourth Amendment permits. We do not decide in this case, however, whether the minimization requirements of 18 U.S.C. § 2518(5) have been exceeded because the appellants failed to raise the issue below and such failure precludes review of this Court. *Brooks v. United States*, 500 F.2d 103, 105 (8th Cir. 1974); 18 U.S.C. § 2518(10)(a). Moreover, because the attendant facts were not fully developed below, review pursuant to our discretionary power to recognize plain error is impossible. *See United States v. Wright*, 466 F.2d 1256, 1259 (2nd Cir. 1972),

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[9] 18 U.S.C. § 2518(5) reads as follows:

> No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

cert. denied, 410 U.S. 916 (1973). Whether the minimization requirements of Title III have been disregarded is a question that can be answered only after a review of the facts and circumstances of each case. What is excessive in one case may be appropriate in another. *United States v. Cox, supra* at 1300. *See United States v. Manfredi, supra; United States v. Lanza*, 349 F.Supp. 929 (M.D. Fla. 1972). We leave to the appropriate occasion review of this question.

VI. The Government's Failure to Record the Entirety of Each Communication Intercepted.

The appellant's second attack on the government's execution of the wiretap orders is also raised for the first time in this Court. They charge that the government violated 18 U.S.C. § 2518(8)(a) which requires, *inter alia*, that the recording of the intercepted communications "shall be done in such a way as will protect the recordings from editing."

The record shows that the government agents listened to the entirety of each communication intercepted but recorded only those parts that "pertained to gambling." "Private conversations" were not recorded. Whether this procedure failed to protect the recordings from editing in violation of the statute is a question we do not here decide. The appellants were aware of the procedure used before trial but did not move for suppression pursuant to 18 U.S.C. § 2518(10)(a), nor do they claim they were denied the opportunity to do so. Neither did they challenge the admission of the recordings on the ground of questionable authenticity. *See United States of America v. Eugene Wesley Howard*, Nos. 73-1856, 73-1857 (8th Cir. October 29, 1974), Slip Op. 12; *United States v. Knohl*, 379 F.2d 427 (2nd Cir.), *cert. denied*, 389 U.S. 973 (1967). The failure to raise the issue below forecloses review.

VII. Whether the Court Erred in Providing the Jury Typed Transcripts of the Communications Intercepted While the Tapes Thereof Were Being Played to the Jury.

The trial court provided the jury with a typed transcript of each intercepted recording offered into evidence by the government. The appellants argue that this violated the best evidence rule, the rule against improper emphasis and repetition and the rule against hearsay.

The use of typed transcripts as visual aids to the jury in listening to the playback of the recorded communications is a matter within the sound discretion of the trial judge. *United States v. Carson*, 464 F.2d 424, 437 (2nd Cir.), *cert. denied*, 409 U.S. 949 (1972); *Fountain v. United States*, 384 F.2d 624, 632 (5th Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968); *United States v. Hall*, 342 F.2d 849, 853 (4th Cir.), *cert. denied*, 382 U.S. 812 (1965).

In the exercise of his discretion, the judge below reviewed the transcripts and found that they were prepared with care and accurately reflected the recorded communications. He also determined that the transcripts were necessary to enable the jury to intelligently follow the recorded conversations which contained gambling language unfamiliar to the jurors. Before distributing the transcripts, the court carefully instructed the jury on their limited use. It directed the jury to use the transcripts only as aids in listening to the recordings and to base its verdict upon what was heard and not upon what was read. Further, the jurors were directed to listen carefully to the declarant's manner and emphasis of speech so as to understand the meaning of what was said. Finally, the transcripts were not made available to the jury during its deliberation. We cannot say that this careful and considered use of the typed transcripts was an abuse of discretion.

VIII. The Installation of Pen Registers.

In conjunction with each order authorizing the interception of wire communications, the District Court issued an order authorizing the installation of pen register on the telephones involved. The appellants' contention that this was improper rests upon a two-pronged argument: Title III of the Act does not authorize the use of pen registers, and further, their use is specifically prohibited by 47 U.S.C. § 605.

Our decision in *United States v. Brick, supra,* explains the error in appellants' argument. Neither Title III nor 47 U.S.C. §605, as amended, prohibit the use of pen registers.

> * * * In this situation it has been held that a pen register order based upon a showing of probable cause, even if considered to be a "search" is not constitutionally offensive * * *.

United States v. Brick, supra at 223.

The propriety of their use depends entirely upon compliance with the Fourth Amendment.[10] *United States v. Giordano,* — U.S. —, 40 L.Ed.2d 341, 375 (1974) (Powell, J., concurring and dissenting).

Upon review of the government's affidavits submitted to the court in application for the orders authorizing the interception of wire communications, we are in agreement with the court below that there was probable cause for the installation of pen registers. The affidavits contained detailed accounts of the personal observations of agents of the FBI, as well as information supplied by reliable unnamed informants, that linked the ap-

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[10] Because the orders authorizing the installation of pen registers satisfied the probable cause requirement of the Fourth Amendment, it is not necessary to decide whether their use constitutes a "search." *See United States v. Giordano, supra* at 375 n. 4; *United States v. Brick, supra* at 223.

pellants to bookmaking. The informants' reliability had been established by previous dealings, and the information supplied here was based on firsthand knowledge. Each informant was actively engaged in gambling activities in the St. Louis, Missouri, area. The orders authorizing the installation of pen registers were constitutionally proper.

IX. **Whether the Court Erred in Refusing to Strike the Testimony of FBI Agent Wilkison Because of the Government's Failure to Record and Produce His Grand Jury Testimony in Light of the Fact That the Testimony of Other Grand Jury Witnesses Was Recorded.**

During the grand jury proceedings resulting in the indictment of the appellants, the government recorded some, but not all, of the testimony presented. For example, the testimony of Aaron Singer, a codefendant who had pleaded guilty, was recorded, while the testimony of FBI Agent Wilkison, who was one of the agents principally in charge of the investigation of the appellants, was not recorded. The appellants assign as error the unfairness of the government's action which made discovery pursuant to the Jencks Act (18 U.S.C. §3500(e)(3)) impossible. They argue that the testimony of Agent Wilkison at trial should not have been admitted. It is important to note that the appellants do not contend that the grand jury was used abusively as a vehicle for discovery. *See United States of America v. Pasquale Sellaro*, No. 71-1719 (8th Cir. June 12, 1973).

While the recording of all grand jury testimony is the desirable procedure, it is not mandatory.[11] *United States v. Franklin*,

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[11] Rule 6 of the Federal Rules of Criminal Procedure has been severely criticized for not requiring the government to record all grand jury testimony. *See, e.g., United States v. Arradondo*, 483 F.2d 980, 984 n. 4 (8th Cir. 1973); *United States v. King*, 478 F.2d 494, 507 (9th Cir. 1973), *cert. denied*, 414 U.S. 846 (1974); *Wright, Federal Practice and Procedure*, § 103 at 161.

429 F.2d 274, 276 (8th Cir.), *cert. denied*, 400 U.S. 967 (1970); F.R.Crim.P. 6. Moreover, the selective recording of grand jury testimony has been held not to be offensive to due process. *United States v. Arradondo*, 483 F.2d 980, 984 (8th Cir. 1973). While we are sympathetic to the appellants' complaint and recognize the limited nature of the relief sought, this Court is without power to amend Rule 6 of the Federal Rules of Criminal Procedure. The power lies with the Congress.

X. **Whether Reversible Error Resulted From the Introduction Into Evidence of a Newspaper Article Prejudicial to the Appellants.**

The government introduced, and had read to the jury, the contents of a newspaper article which FBI agents had observed appellant Lekometros read to appellants Padratzik and John. It was admitted for the purpose of proving the guilty knowledge of the appellants.[12] The relevancy of the newspaper article is not contested. The appellants argue, rather, that the prejudicial effect of its introduction into evidence outweighed the probative value. They assert that the verbatim reading of the newspaper article attacked their character and intimated they were part of a more heinous conspiracy than the one charged. We agree that the article should not have been read, but find the error harmless.

The court instructed the jury, immediately after the newspaper article was read, to consider only the fact that Mr. Lekometros had read the article to Messrs. Padratzik and John, and not to consider the article as proof of any fact stated therein. The government's testimony which followed also was limited to the relevant issue of *scienter;* the prejudicial nature of the article was not emphasized either during trial or in closing ar-

[12] 18 U.S.C. § 1952 requires, as an element of proof, the knowing involvement in an unlawful activity.

gument. This isolated intrusion of prejudicial evidence in a record strongly supporting the verdict of the jury had but slight, if any, effect and must be judged as harmless. *See United States v. Oliver*, 492 F.2d 943 (8th Cir. 1974); *United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974).

XI. **Whether the Admission Into Evidence of the Recorded Statements of Persons Not Defendants at Trial Violated the Rule Against Hearsay.**

The appellants objected to twenty of the thirty-five recorded communications admitted into evidence on the ground that they contained statements of persons not defendants at trial. The appellants contend that the admission of these recordings violated the rule against hearsay.

A well recognized exception to the rule against hearsay provides:

> * * * [O]ut of court statements made by a conspirator can be admitted against both declarant and his coconspirator if there is independent evidence of the conspiracy and if the statements were made during the pendency of the conspiracy in furtherance of the conspiracy itself.

United States v. Overshon, 494 F.2d 894, 898 (8th Cir. 1974). The exception is not limited to the statements of conspirators who are made defendants at trial. *United States v. Richardson*, 477 F.2d 1280, 1283 (8th Cir.), *cert. denied* 414 U.S. 843 (1973).

The statements of Eugene Hanon, Aaron Singer and David Goldberg, if hearsay, were within the exception to the rule and properly admitted. There is independent evidence in the record to indicate that they were coconspirators and that their statements were made during the conspiracy and in furtherance

of it. Because we find no independent evidence that Joe Samuelson, Ben Cohen and Mark Hanon were coconspirators, a closer review of their statements is necessary.

The statements of Ben Cohen and Mark Hanon were not hearsay. Their statements were received into evidence for the fact that the statements were made and not for the truth or falsity of the matters asserted. The statements of Joe Samuelson, with a few exceptions, were properly received on the same basis. The remaining statements were received by the court on the government's offer of proof that he would be shown to be a coconspirator. *See United States v. Reed*, 446 F.2d 1226, 1231 (8th Cir. 1971). Moreover, the court instructed the jury that before it could use the statements against anyone but the declarant, it had to find that Mr. Samuelson was a coconspirator. There is nothing in the record to indicate that the jury did not follow that instruction. We also note that no motion to strike Samuelson's testimony at the close of the evidence was made.

XII. The Sufficiency of the Evidence.

A. The substantive offense.

Appellants Padratzik and Bernstein challenge the sufficiency of the evidence to support the verdict of the jury finding them guilty of violating 18 U.S.C. § 1952 as a principal or an aider and abettor under 18 U.S.C. § 2. Section 1952 requires proof: (1) that a facility in interstate commerce was used by the defendants, (2) with intent by them to carry on or facilitate the carrying on of an unlawful activity in Missouri, and (3) thereafter they committed an act or attempt in furtherance of the unlawful activity. *Spinelli v. United States, supra*, at 893. The aiding and abetting statute requires proof of some affirmative participation which at least encourages the perpetrator. *United*

States v. Atkins, 473 F.2d 308, 310 (8th Cir.), *cert. denied* 412 U.S. 931 (1973).

The appellants concede the sufficiency of the evidence of use of a facility in interstate commerce—the telephone. They challenge the sufficiency of the evidence to support the second and third elements. We view these challenges in the light most favorable to the jury verdict with all evidentiary conflicts resolved in favor of that determination. *United States v. Simone*, 495 F.2d 752, 753 (8th Cir. 1974).

In this light, we hold that the jury could find the requisite intent from the recordings of the conversations between appellant Padratzik, in Missouri, and appellant Bernstein, in Las Vegas. The interstate telephone calls were used to pass line information from Bernstein to Padratzik with knowledge on the part of both that the line information would be used in a bookmaking operation by Padratzik and others in Missouri.

The jury finding of the subsequent overt act in furtherance of an activity violative of state law turns upon the requirements of Mo.Rev.Stat. §§ 563.350 and 563.360. The appellants argue that the evidence is insufficient to show a violation of either statute because there is nothing to show that they recorded or registered bets. Such a showing would prove the violation of state law. Mo.Rev.Stat. § 563.360, however, prohibits more than the act of recording bets and wagers. *United States of America v. Pasquale Sellaro, supra* at Slip Op. 9.

The evidence shows that appellant Padratzik distributed to Missouri bookmakers the line information received from Las Vegas by telephone. Moreover, the gambling paraphernalia seized at the arrest of appellant Padratzik and John supports the conclusion that they too recorded bets or wagers. The jury conclusion that Mr. Padratzik acted in violation of 18 U.S.C. § 1952, and that Mr. Bernstein, who supplied the line informa-

tion necessary to the gambling operation, was at the very least an aider and abettor punishable as a principal is supported by the record.

B. Conspiracy offense

All appellants challenge the sufficiency of the evidence to support their conviction of conspiracy. Appellant John argues further that even if the evidence shows the existence of a conspiracy, his participation therein was not violative of federal law.

The record shows a concert of action among the appellants. Padratzik received the line information from his Las Vegas contact, Bernstein, and then directed his employee, John, on the use of that line information. John, in turn, would report to Padratzik on the bets received. Appellant Lekometros also maintained a Las Vegas contact, David Goldberg,[13] for the receipt of line information. Padratzik and Lekometros would compare and discuss the line information received from their respective sources. Together with appellant John and others, they would also meet together to discuss the operation of the bookmaking business. Other meetings were held in Las Vegas with Padratzik, Lekometros, Bernstein and Goldberg for the same purpose.

John's contention that his participation in the conspiracy was not violative of federal law rests upon his asserted lack of knowledge of use of an interstate facility. He relies on *United States v. Barnes*, 383 F.2d 287 (6th Cir. 1967), *cert. denied*, 389 U.S. 1040 (1968). The reliance is misplaced, for the record supports the conclusion that John knew the telephone was used by Padratzik in Missouri to obtain line information from a Nevada source.

A conspiracy is rarely proved by direct evidence. The proof usually rests upon circumstantial evidence and inferences drawn

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[13] Mr. Goldberg was severed from the trial and the charges against him were later dismissed by the government.

from the relationship of the parties. *Koolish v. United States*, 340 F.2d 513, 523 (8th Cir.), *cert. denied*, 381 U.S. 951 (1965). Here, the jury could conclude from the meetings attended by John, where gambling was discussed and telephone calls attempted, that he knew of the Las Vegas contact.

XIII. Whether Submission of the Case to the Jury on the Theory of One Conspiracy Was Correct.

The jury was instructed that before it could find the appellants guilty of conspiracy, it had to find beyond a reasonable doubt that a conspiracy existed and that each appellant was a member thereof. The appellants assert that the evidence showed not one but several conspiracies and argue that the failure of the instruction to conform to the evidence requires reversal. They cite *Kotteakos v. United States*, 328 U.S. 750 (1946).

The facts here, however, are dissimilar to those presented in *Kotteakos*, for the evidence establishes the existence of but one conspiracy.

> The answer to the question whether there is a single conspiracy * * * depends on whether there is a single agreement. There may be an undertaking to commit one crime or several crimes. If there is but one agreement, there is but one conspiracy. A test whether the activities of the defendants constitute a single conspiracy is whether there is a common purpose underlying the separate acts, whether the same objective is being pursued in each instance, and whether there is concerted action to achieve this end.

Koolish v. United States, supra at 524, citing from *United States v. Speed*, 78 F.Supp. 366, 368 (D. D.C. 1948).

The facts recited in section XII show that each appellant acted with the others to promote the operation of the gambling

business. The fact that they may have also acted as independent bookmakers does not preclude their participation in the single conspiracy. *United States v. Hanon*, 428 F.2d 101, 108 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971).

Affirmed.

A true copy

Attest

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

Judgment

(Filed January 8, 1974)

United States Court of Appeals
For the Eighth Circuit

No. 72-1594. September Term, 1974.

The United States,

Appellee,

vs.

Charles Bernstein, aka Chuck Bernes and Charles Bernes, David Goldberg, Eugene Joseph Hanon, aka "The Kid," Mark Joseph Hanon, aka "Sonny," Nick John, Steve Lekometros, aka "The Greek,"

Appellant,

Victor Padratzik, aka "V.I.," Aaron Nathan Singer, aka "Acey-Ducey," "Asa" and "Andy."

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

January 6, 1975

United States Court of Appeals
For the Eighth Circuit

The United States,
Appellee,
vs.
Charles Bernstein aka Chuck Bernes and Charles Bernes,
Appellant.
No. 72-1581.

On motion of Appellant, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a Certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

February 6, 1975

APPENDIX C

Title 18, United States Code:

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of——

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on pay-

ments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprizes), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit tranactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State

to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted.

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order,

a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has

been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral com-

munication under this sub-section shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-932

STEVE LEKOMETROS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-1125

CHARLES BERNSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-6227

NICK JOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 508 F.2d 1134.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1975. Petitioner Lekometros filed a timely petition for certiorari on January 28, 1975. Bernstein's petition (No. 74-1125) was not filed until March 7, 1975, and consequently is out of time under Rule 22(2) of the Rules of this Court.[1] John filed a timely petition for rehearing in the court of appeals. Rehearing was denied on February 20, 1975, and John's petition for certiorari was timely filed on March 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence that does not show personal knowledge of the interstate element of the crime is sufficient to support the conviction of petitioner John for conspiring to violate the Travel Act.

2. Whether the government used proper procedures to obtain, execute and report on wire interception orders:

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[1] The stay of mandate obtained by petitioner Bernstein (Bernstein Pet. App. A-22) does not extend the time within which to petition for certiorari. *Boylan* v. *United States*, 257 U.S. 614. A stay of mandate suspends the effectiveness, not the finality, of a judgment.

a. Whether an affidavit by the Attorney General adequately establishes his role in the request for authorization.
b. Whether overhearing agents should have fully recorded each conversation.
c. Whether the agents adequately "minimized" the extent of the overhearings.
d. Whether agents timely provided petitioner John with an inventory of the overhearings.

3. Whether the court of appeals properly applied the harmless error doctrine with regard to evidence that showed that a newspaper article was read by petitioner Lekometros to a co-conspirator.

4. Whether the Jencks Act requires the government to record the proceedings of the grand jury.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted of conspiracy to violate 18 U.S.C. 1952 (the Travel Act) by using interstate telephone facilities to carry on a gambling business violative of state law, in violation of 18 U.S.C. 371. In addition, petitioner Bernstein was convicted on five substantive Travel Act counts. All petitioners were sentenced to terms of three years' imprisonment and $2,000 fines; the sentences of petitioner Bernstein are to run concurrently. The court of appeals affirmed (Pet. App. A; 508 F.2d 1134).[2]

[2] "Pet. App. A" refers to the appendix in No. 74-932.

1. Beginning in December 1970, agents of the Federal Bureau of Investigation conducted an investigation of the gambling activities of petitioners and others in St. Louis and Clayton, Missouri, and Las Vegas, Nevada.[3] The evidence at trial disclosed an extensive enterprise in which petitioners Lekometros and John, and others, received gaming odds from confederates (including petitioner Bernstein) in Las Vegas. After receipt of these odds (sometimes by telephone, and sometimes after personal visit), petitioners would alter the odds and accept bets on sporting events. Petitioners Lekometros and Bernstein do not challenge the sufficiency of this evidence. Petitioner John contends that the evidence shows at most that he was involved in a gambling enterprise, but that it does not show his knowledge of its interstate character (John Pet. 10). We therefore summarize the evidence only as it pertains to petitioner John.

On the morning of December 20, 1970, John, Lekometros and co-defendants Eugene Hanon and Victor Padratzik met at a restaurant in Clayton. Hanon disclosed that he had just returned from Las Vegas, where he had won more than $3,000 (Tr. 794). Lekometros complained that he had "a problem with my book" (Tr. 795). Hanon stated that he would

[3] Several co-defendants were named in the indictment with petitioners. Mark Hanon, Eugene Hanon and Aaron Singer pleaded guilty prior to trial. Charges against David Goldberg were dismissed. Co-defendant Victor Padratzik, tried and convicted with petitioners, died shortly after the opinion of the court of appeals was filed.

alleviate Lekometros's problem by booking "what you can't handle" (Tr. 795). Lekometros stated that the previous day was a good one; that he estimated that he had "beat them for about 250 per game"; and that the "price of money" was bound to fall if those results continued (Tr. 795). Hanon told Lekometros that he erred by being influenced by local action and by unknowledgeable people, causing him to "shave the line" (Tr. 795). In further conversation Padratzik, Hanon, and Lekometros discussed the odds on professional football games, with Hanon informing that "the bottom three teams on your board's wrong. You'll lose money on that" (Tr. 796). Hanon also complained that he had been meeting with the others for thirteen weeks and still had not straightened out all of the matters (Tr. 796-797). Lekometros suggested that they consider hockey, noting that although the low scoring in that sport made it difficult to "get set up," they should be able to arrive at some sort of arrangement (Tr. 797).

Beginning in January 1971, federal agents conducted court-approved electronic surveillances of certain telephone lines frequently used by petitioners and their co-defendants. On January 25, 1971, John told his employer, Padratzik, that he had received a fifty dollar wager from a bettor who had the code number 21; that he had passed on half the bet (evidently by layoff) to Eugene Hanon; and that he had received two other wagers (Govt. Exh. 21; Tr. 208, 1098-1099).

In March 1971, federal agents observing and monitoring the telephone calls of Bernstein in Las Vegas and Padratzik in St. Louis were able to detect a pattern. According to the agents' testimony at trial, Padratzik would telephone Bernstein at previously set times, would receive the latest information regarding odds on forthcoming sports events, and would be told which of several telephone numbers to call the following day (Tr. 48, 132, 488-492, 541-543, 918-919, 1101-1102; Govt. Exhs. 22, 25, 26). Then Padratzik would relay the odds information to John and discuss the wagers accepted by John (Tr. 132, 306, 1102-1106; Govt. Exhs. 28, 30, 33, 34, 36).

On the morning of March 20, Lekometros, Padratzik, John, and Eugene Hanon were observed seated at a table at the Clayton Inn discussing upcoming hockey and basketball games. Terms such as "line," "favorite" and "points" were used often during the conversatioin (Tr. 1020-1022).

On the afternoon of April 5, 1971, Padratzik, John, Singer, Eugene Hanon and Lekometros were observed together at a restaurant in St. Louis. Both Hanon and Padratzik commented that the "heat was on." Several minutes later Hanon stood up and said that if Padratzik were afraid to make the call to Las Vegas, he would do it (Tr. 679-683).

2. On June 19, 1971, agents in Las Vegas and St. Louis arrested petitioners and certain of their co-defendants. Padratzik and John were arrested as they sat by a card table in the bedroom of a motel suite in St. Louis. Upon being told that they were

under arrest, Padratzik tore a pack of paper into pieces and placed it upon the bed beside him. A box of pens and pencils and several packets of quick burning flash paper were on the card table. Several sheets, including the ones torn by Padratzik, contained written notations of wagers, results of wagers, amounts owed or due to bettors, and wagering information for forthcoming baseball games (Tr. 1119-1127, 1211-1217).

In the course of the search, the agents answered several telephone calls. One, from a person who identified himself as "25," requested information about a starting pitcher. A second, calling himself "number 9," made a $200 wager on a baseball game (Tr. 1138-1139). Another caller, "55," asked "Is this Vic?" and then quickly hung up (Tr. 1301). Then "44" called, asking if Duke were there. An unidentified caller also asked for Duke. Then "55" called back, asking for Duke or Nick, and whether "it" was in. Finally, "45" called and asked what was the matter. An agent said that nothing was the matter. The caller asked "Who is this?" and abruptly hung up (Tr. 1301-1303).

ARGUMENT

1. Petitioner John alleges that the evidence is insufficient to convict him because it does not establish that he knew interstate facilities had been used to transmit the information necessary for the gambling business. However, the evidence shows that John worked directly with Padratzik in a bookmaking op-

eration, that he attended several meetings of the conspirators when gambling was openly discussed and interstate telephone calls were attempted, that he was a participant in the discussions regarding wagers, and that he ordinarily received the "line" information from Padratzik immediately after the latter had received it from Las Vegas. The jury could properly infer from this pattern of conduct, as well as from John's presence at critical meetings involving telephone calls, that John was well aware of the out-of-state source of the information.[4] See *United States* v. *Sanchez*, 508 F.2d 388, 393 (C.A. 5); *United States* v. *Hester*, 465 F.2d 1125 (C.A. 8); *United States* v. *Aron*, 463 F.2d 779 (C.A. 9).[5]

Petitioner John apparently contends as well (John Pet. 11) that interstate transmission of gambling odds does not violate the Travel Act. *Rewis* v. *United States*, 401 U.S. 808, held that a wholly intrastate gambling business does not violate 18 U.S.C. 1952 simply because some customers may come from out

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[4] It therefore is unnecessary to consider whether every conspirator's personal knowledge of the interstate character of the transaction is an element of the offense. Cf. *United States* v. *Feola*, No. 73-1123, decided March 19, 1975.

[5] *United States* v. *Barnes*, 383 F.2d 287 (C.A. 6), is not to the contrary. The only interstate elements in *Barnes* were the purchase of dice and chips manufactured out-of-state and the occasional cashing of checks drawn on out-of-state banks. The court concluded that the government had not shown knowledge of these elements. The interstate element in the instant case is far more important to the enterprise, and we have demonstrated that the evidence supports an inference that John knew of that element.

of state. But here, unlike *Rewis*, the government showed that the interstate telephone calls were integral parts of the successful operation of the bookmaking business of which John was a part, and that the calls were made by the conspirators themselves. The conspiracy in this case was within the reach of the Travel Act.

2. Petitioners contend that defective procedures were used by the government to obtain, carry out and report on four court orders permitting interceptions of wire communications.

The procedure used in this case to obtain the court orders was identical to that held not to warrant suppression in *United States* v. *Chavez*, 416 U.S. 562. A memorandum personally initialed by then Attorney General John Mitchell directed the Assistant Attorney General for the Criminal Division to make application for an order to permit interception of oral communications. An application was filed in the district court, accompanied by a letter from the Deputy Assistant Attorney General stating that authorization to seek the wiretap order had been delegated to the latter by Mr. Mitchell. When petitioners later challenged this application, the government furnished the district court with a sworn affidavit of Mr. Mitchell stating that he personally had initialed memoranda authorizing the four applications for interception orders (see Pet. App. A-4).

a. Petitioners were not entitled to a remand for a "hearing to probe the true role of Attorney General Mitchell in the authorization procedures" (Lekome-

tros Pet. 8). As in *Chavez*, the Attorney General submitted an affidavit that he personally approved the application. Petitioners have asserted no basis for questioning the accuracy of this affidavit. As stated in *United States* v. *Doolittle*, 507 F.2d 1368, 1371 (C.A. 5):

> The procedure of filing the affidavit of the Attorney General and his subordinates, as a method of proving the administrative history of the specific authorization in this case, is identical to that used in *Chavez*. There is no constitutional infirmity in the district court's refusal to require more of the Attorney General on this narrow issue of fact.

See also *United States* v. *Bohn*, 508 F.2d 1145 (C.A. 8), petition for a writ of certiorari pending, No. 74-951.

Petitioners' situation is unlike that in *United States* v. *Robinson*, 472 F.2d 973 (C.A. 5) (*en banc*), a pre-*Chavez* decision, which remanded to allow the government to supplement the record regarding the authorization procedure. In *Robinson* the district court had not developed any record on the authorization procedures, and the remand would have produced additional evidence that the court of appeals believed necessary to determine the legality of the government's procedures. But *Chavez* now is conclusive on that legal question, and petitioners have not demonstrated that the record on the factual issue in this case is inadequate to support the inquiry required by *Chavez*.

b. In the court of appeals, petitioners contended that the government did not "minimize" the extent of overhearings. Petitioners also contend, somewhat inconsistently, that the agents should have more fully recorded their conversations. The agents had not recorded portions of conversations they had concluded were of a private nature. Petitioners repeat both arguments here.

The court of appeals properly declined to address these arguments, because petitioners had not raised them in the district court in a motion to suppress, as required by 18 U.S.C. 2518(10)(a) (Pet. App. A-8 to A-10). Section 2518(10)(a) unequivocally states that suppression motions "shall be made before the trial * * *." Petitioners did not raise these claims at any time in the district court, and they cannot raise them here. See *United States* v. *Sisca*, 503 F.2d 1337, 1346-1349 (C.A. 9), certiorari denied, November 11, 1974, No. 73-1855.

Petitioners suggest, however, that their neglect is excusable because they did not understand before trial the meaning of the term "private conversation," which the government placed in the transcripts to indicate non-recorded portions, and because they filed pretrial motions urging that "the procedure for interception was invalid and unconstitutional" (Lekometros Pet. 6-7). However, petitioners could have inquired about the meaning of "private conversation," although we think that the term, in context, is clear. Nor did the blunderbuss contention of invalidity satisfy Section 2518(10)(a); the purpose of that sec-

tion is to allow all suppression issues to be litigated prior to trial (see *Sisca*, *supra*, 503 F. 2d at 1348). This objective cannot be achieved unless the grounds of illegality are urged with some particularity, so that the government can respond and the district court can pass upon them. Section 2518(10)(a) requires pretrial decision of the suppression claims and is not a device through which unlitigated claims of error can be stored up for presentation to the court of appeals.

In any event, the conduct of the agents in shutting off the recording mechanism after determining that they were overhearing conversations unrelated to gambling was a reasonable attempt to comply with 18 U.S.C. 2518(5), which provides that interceptions "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." *United States* v. *Scott*, 504 F.2d 194 (C.A.D.C.); *United States* v. *Manfredi*, 488 F.2d 588, 600 (C.A. 2), certiorari denied, 417 U.S. 936; *United States* v. *Tortorello*, 480 F.2d 764, 784 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Cox*, 462 F.2d 1293, 1300-1301 (C.A. 8); certiorari denied, 417 U.S. 918.[6]

c. Petitioner John's argument (Pet. 14-16) that the district court should not have allowed the government to postpone (until the last interception had ended) service of the inventory of conversations in-

[6] Only petitioner John (John Pet. 17) raises the alternative claim that the agents failed to minimize their overhearings. He advances no arguments in support of this assertion, and we know of none.

tercepted pursuant to the first of four authorizations[7] was properly rejected by the Eighth Circuit (Pet. App. A-6 to A-8). That court found that postponements were proper because they were necessary to preserve the effectiveness of the continuing investigation. The government's requests conformed to the standards set forth in the statutory scheme, see 18 U.S.C. 2518(8)(d), and did not contravene the obligation of the government to provide notice within a reasonable time.

3. At the outset of the investigation, agents observed and heard Lekometros read to confederates a newspaper article concerning a gambling raid. The article reported that federal agents had conducted a gambling raid simultaneously in 26 cities and had made 27 arrests, including the arrest of two executives of Caesar's Palace in Las Vegas, Nevada, and that the executives had been charged with using telephones in aid of racketeering (Tr. 264-265). Lekometros then commented, "Well, that just goes to show you you should stay off the telephones in your business" (Tr. 269). He also described the correct way to use operators in long distance calls for his "business" (Tr. 269-270).

At trial, an agent was permitted to read the article to the jury (Tr. 264-265). The court instructed the jury that the article was not evidence of the truth of any matter contained therein (Tr. 268).

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[7] Postponements were not required as to the three later court-authorized interceptions, since the investigation terminated within ninty days of the orders approving the interceptions.

In the court of appeals, the government contended that this incident was not erroneous, because the reading established the state of mind of those at the meeting. However, the court concluded that, in light of references in the article to "the financial apparatus which bankrolls organized crime" (Tr. 265, 266) the article should not have been read because its prejudicial effect outweighed its probative value. But, the court held, the error was harmless in light of the overwhelming evidence of petitioners' guilt (Pet. App. A-14).

Petitioners apparently contend that a prejudicial error cannot also be harmless (Lekometros Pet. 10-11). This is inaccurate. The discussion of the article was an "isolated intrusion of prejudicial evidence" (Pet. App. A-15) that "did not influence the jury, or had but very slight effect ***." *Kotteakos* v. *United States*, 328 U.S. 750, 764. The court was entitled to conclude that the prejudice was harmless beyond a reasonable doubt. See Comment, *Principles for Application of the Harmless Error Standard*, 41 U. Chi. L. Rev. 616 (1974). Moreover, the issue involves a particularized judgment based on the court of appeals' review of the record in this case and presents no question of general importance meriting review by this Court.

4. Petitioner John claims that the government "deliberately" failed to record the grand jury testimony of some of its main witnesses, thereby depriving him of materials that would have been subject to production under the Jencks Act, 18 U.S.C. 3500

(John Pet. 12-13). However, nothing in the record supports the argument that the government intentionally deprived the defendants of Jencks Act materials. In any event, recordation is not mandatory (Pet. App. A-13 to A-14). See Fed. R. Crim. P. 6. The 1970 amendment to the Jencks Act, codified as 18 U.S.C. 3500(e)(3), provides for the production of grand jury testimony for purposes of impeachment. But the amendment does not require the government to record all grand jury testimony in order to develop potential Jencks Act statements. See *United States* v. *Cruz*, 478 F.2d 408 (C.A. 5), certiorari denied *sub nom. Fuentes* v. *United States*, 414 U.S. 910. Recordation is governed by Rule 6; Section 3500(e)(3) applies only after the testimony has been recorded.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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APRIL 1975.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-932

STEVE LEKOMETROS,
Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

ARGUMENT

The Solicitor's argument that the selective shutting off of the recording mechanism was merely an attempt to "minimize" the wiretapping in accordance with the statute (Brief in Opposition, p. 12) demonstrates a total misunderstanding of what actually took place in the instant wiretap procedure. As Agent Cunningham testified (Tr. 310-311), the **entire** conversations were inter-

cepted and overheard, but only parts of these conversations were recorded. In other words, the interception was not minimized—only the electronic recordation was minimized. The statute itself is very clear in requiring that telephone conversations which are in fact intercepted **shall** (if possible) be recorded, 18 U.S.C. 2518 (8) (a).

If the agents had truly made a reasonable attempt to minimize interception, as the government contends, they would have simply terminated the interception of any conversation which was unrelated to gambling. Instead, the agents continued to intercept and overhear such conversations, but deliberately failed to record same. The result, of course, was fragmentary electronic recordations which contained only what the agents wanted them to contain, and which was only brought to light, for the first time, when Agent Cunningham testified during the trial.

The government's own brief on this point further illustrates the immediate need for Supreme Court clarification to prevent added confusion in this field, and to make clear the distinction between interception of telephone conversations and recordation of same. This distinction apparently is not presently recognized by the government, but is one which should be carefully defined and preserved because of the specific and different statutory requirements: interception should be minimized, but recordation must be maximized. Both requirements are included in the statutory scheme for the obvious protection of individual rights, and neither should be ignored.

Respectfully submitted

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